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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. STEVEN SHERWOOD, Defendant and Appellant.	A147968 (Solano County Super. Ct. No. FCR309179)

Steven Sherwood was convicted of 16 sex crimes against 11 children under the age of 14 and possession of child pornography. He was sentenced to 239 years eight months in prison. He argues the trial court erred in failing to instruct on the lesser offense of attempted oral copulation as to one count. We reject the argument because there was no substantial evidence Sherwood committed an attempt rather than the completed act. He also argues his sentence is unconstitutionally disproportionate to his offenses. We disagree and affirm the judgment.

FACTS

Sherwood was initially charged by information with 17 sex crimes committed between October 2007 and June 2014. The charges included two counts of continuous sexual abuse of children under 14 (§ 288.5, subd. (a); counts 2, 5); one count of an attempted lewd or lascivious act against a child under 14 (§§ 664, 288, subd. (a); count 3); five counts of lewd or lascivious acts against children under 14 (§ 288, subd. (a); counts 4, 9, 11, 12, 17); three counts of aggravated sexual assault (forcible oral copulation) of children under 14 (§ 269, subd. (a)(4); counts 6, 8, 15); one count of a forcible lewd or lascivious act against a child under 14 (§ 288, subd. (b)(1); count 7);

one count of sexual intercourse with a child 10 or younger (§ 288.7, subd. (a); count 16); and four counts of oral copulation or sexual penetration with children 10 or younger (§ 288.7, subd. (b); counts 1, 10, 13, 14). Sherwood also was charged with one count of possession of child pornography (§ 311.11, subd. (a); count 18). It was alleged he committed certain offenses (§§ 288, subds. (a), (b), 288.5, subd. (a)) against more than one victim. (See § 667.61, subds. (b), (c)(4), (8), (9), (e)(4)). The prosecutor dismissed count 1, and during trial count 10 was amended to conform to proof to charge lewd or lascivious conduct with a child under 14 (§ 288, subd. (a)).

A jury convicted Sherwood of all outstanding counts (i.e., counts 2–18) and found the multiple victim allegations true. The court sentenced him to 14 consecutive terms of 15 years to life for counts 2, 4 to 15, and 17; a consecutive term of 25 years to life for count 16; and determinate terms of four years for count 3 and eight months for count 18, for a total aggregate sentence of 239 years eight months to life.

This appeal focuses on two counts of forcible oral copulation (counts 6 and 8), both of which were offenses committed against K.A. Her testimony concerned incidents that took place in three discrete places: a vacant house, a park, and K.A.'s home.

The vacant house was the location for the oral copulation related to count 6. When K.A. was in fifth grade, Sherwood (her aunt's husband) picked her up after school one day and drove her to a vacant house, where he apparently had been doing some work. He took her inside and undressed her while she cried and said, "No." He used something like a bandana to tie her hands behind her back and, as she lay naked on the ground, touched her breasts with his hand and her buttocks with something other than his hand. He had a camera with him and he told her not to move and pushed her down when she rose up. Sherwood then untied K.A.'s hands and had her kneel in front of him in a bathroom, pushing her down as she said, "No." To get her to comply, he threatened to post pictures of her at her school. He took off his pants and told her to put his penis[1] in

[1] K.A. circled a body part on a diagram, marked it "A," and testified about Sherwood's conduct with respect to his body part "A." Although the diagram is not in

her mouth as he pointed a camera at her face. Sherwood pressed his penis against her closed mouth, and it went into her mouth a little. Sherwood again threatened to post pictures of K.A. at her school if she told anyone about what he had done.

Count 8 concerned another incident of forcible oral copulation, this time in a park. When K.A. was about 11 or 12 years old, Sherwood took her and her cousins to a park in Vacaville. When the cousins ran off to play hide-and-seek, Sherwood made K.A. stay behind, in a tunnel, and told her to put his penis in her mouth while he took pictures. She complied because he again threatened to post pictures of her at her school.

Additional incidents in K.A.'s home are also relevant to this appeal. From the age of 10, K.A. lived with her mother and extended family members in Fairfield, and Sherwood sometimes stayed in their home. Sherwood periodically asked K.A. to take photographs and videos of her naked body when they were at home or in a library, and she complied. At home, Sherwood repeatedly touched K.A.'s breasts over her clothes (a lot more than 10 times); touched her buttocks (a lot); touched her "front" over her clothes (10 to 15 times, which was "not a lot"); and at least once touched her "front" with his skin. He also asked her two or three times to touch his penis over his clothes, and she did it once.

DISCUSSION

A.

We reject Sherwood's argument that the trial court committed reversible error by failing to instruct the jury on a lesser include offense, attempted oral copulation, as to count 6.

" ' "[A] trial court must instruct on lesser included offenses, even in the absence of a request, whenever there is substantial evidence raising a question as to whether all of the elements of the charged offense are present." ' [Citation.] Conversely, even on request, the court 'has no duty to instruct on any lesser offense unless there is substantial evidence to support such instruction.' " (*People v. Cole* (2004) 33 Cal.4th 1158, 1215.)

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the appellate record, it is apparent from other parts of the transcript and from the parties' briefs that body part "A" referred to Sherwood's penis.

Substantial evidence means evidence from which a reasonable jury could conclude "that the lesser offense, but not the greater, was committed." (*People v. Breverman* (1998) 19 Cal.4th 142, 162.) On appeal, we review the issue de novo. (*Cole*, at p. 1215.)

Sherwood offers a strained argument: "[D]uring cross-examination, K.A. acknowledged telling the police that she only touched [Sherwood's] penis on one occasion. Thus, if the jury believed that to be the case, it could have logically inferred that K.A. was the victim of only one completed act of oral copulation, and that what happened in the empty house (as opposed to the park) was only an attempt." He argues the jury could have concluded the vacant house incident was only an attempt because "K.A. was equivocal in her testimony as to whether [Sherwood's] penis actually entered her mouth. She vaguely stated that some part of his penis went into her mouth 'a little,' but also said that he was 'trying to put it in my mouth, but I would have it closed.' "

Sherwood is wrong for at least two reasons. First, as Sherwood himself acknowledges, oral copulation does not require actual penetration of the mouth; any contact between the mouth and a sex organ is sufficient. (See *People v. Dement* (2011) 53 Cal.4th 1, 42 [approving instruction stating "any contact, however slight, between the mouth of one person and the sexual organ or anus of another person constitutes oral copulation" under former § 288a, renumbered as § 287], overruled on other grounds by *People v. Rangel* (2016) 62 Cal.4th 1192, 1216.) K.A. testified Sherwood took her into a bathroom in the vacant house, forced her to get on her knees, and told her to put his penis into her mouth. She was explicit about what happened next:

"Q: And did you?

"A: No, but then he kept trying to force it in me.

"Q: So you said no, and he tried to force you. Could you explain to me what that means?

"A: He put it against my mouth, and I would have it closed.

"Q: Did any part of it actually go into your mouth?

"A: It did a little.

"Q: When I say 'it,' can you tell me, are we talking about [his penis]?

"A: Yes."

Nothing was equivocal or vague about K.A.'s testimony establishing the requisite contact for oral copulation.

Second, the testimony on which Sherwood relies does not relate to, much less undermine, K.A.'s testimony that he tried to force his penis into her mouth at the vacant house. Rather, the testimony relates to how many times she touched his penis with her hands at her own home. The court and prosecutor created a clear record on this matter during K.A.'s direct examination. In a series of questions focused only on incidents in K.A.'s home, the prosecutor asked, "*While you were at the house* [*in Fairfield*], okay, did he have you touch any part of his body *with your hands*?" (Italics added.) The court interjected, "[J]ust for clarification*, we are not asking about the time in the vacant house or the time in the tunnel*" and the prosecutor confirmed, "*We are only talking inside the* [*Fairfield*] *house*, okay." (Italics added.) K.A. confirmed she understood and testified Sherwood had her touch his penis over his clothes "[l]ike five times." On cross-examination, defense counsel referred to "[t]he incident you described, you had described that you were made to, or that you were asked to touch Steven's penis" and recounted, "it was your earlier testimony that it happened several times." To impeach this testimony, counsel asked K.A. about her prior statement to the police "that [Sherwood] had told you to put *your hands* on his penis two or three times." (Italics added.) K.A. confirmed she "told the police that [Sherwood] asked [her] to touch his penis two or three times, but [she] did it only one time."

No reasonable juror would understand K.A.'s statement that she "did it only one time" to mean she only had physical contact—with her hands or mouth, directly or through clothes—with Sherwood's penis one time, counting the separate incidents at the vacant house, her home, and the park. "[O]n this record there is no basis, other than an unexplainable rejection of the prosecution evidence, on which the jury could have found the offense [charged in count 6] to be something other than" the completed act of oral copulation. (*People v. Harris* (1994) 22 Cal.App.4th 1575, 1583 [rejecting claim of error in failing to instruct on lesser included offense].)

B.

We also reject Sherwood's argument that his sentence of 239 years eight months to life amounts to cruel and unusual punishment in violation of the federal and state constitutions. (U.S. Const., 8th Amend.; Cal. Const., art. I, § 17.)

Under both constitutions, "[t]he judicial inquiry commences with great deference to the Legislature. Fixing the penalty for crimes is the province of the Legislature, which is in the best position to evaluate the gravity of different crimes and to make judgments among different penological approaches. [Citations.] Only in the rarest of cases could a court declare that the length of a sentence mandated by the Legislature is unconstitutionally excessive." (*People v. Martinez* (1999) 76 Cal.App.4th 489, 494.) "Whether a punishment is cruel or unusual is a question of law for the appellate court, but the underlying disputed facts must be viewed in the light most favorable to the judgment." (*Id.* at p. 496.)

A sentence for a term of years violates the Eighth Amendment only if it is "extreme" and "grossly disproportionate for a particular defendant's crime." (*Graham v. Florida* (2010) 560 U.S. 48, 59–60.) "A court must begin by comparing the gravity of the offense and the severity of the sentence. [Citation.] '[I]n the rare case in which [this] threshold comparison . . . leads to an inference of gross disproportionality' the court should then compare the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions. [Citation.] If this comparative analysis 'validate[s] an initial judgment that [the] sentence is grossly disproportionate,' the sentence is cruel and unusual." (*Id.* at p. 60.)

Similarly, punishment may violate article I, section 17 of the California Constitution if "it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424, fn. omitted; see *People v. Dillon* (1983) 34 Cal.3d 441, 477–479.) We analyze three criteria to determine whether a sentence meets this standard: the nature of the offense and the offender, a comparison of the sentence with those for other more

serious offenses under California law, and a comparison of the sentence with those in other states for the same offense. (*Lynch*, at pp. 425–427.)

Sherwood offers no argument as to how his sentence compares to the nature of his offenses—multiple sex offenses against 11 children over six years. Nor does he make an effort to compare his sentence with punishments in other states for similar offenses. His failure to address these issues amounts to a concession his sentence withstands such analysis. (See *People v. Retanan* (2007) 154 Cal.App.4th 1219, 1231.) What Sherwood does argue is that his effective life sentence without the possibility of parole is disproportionate because such a sentence is only expressly authorized in California for the crime of murder with special circumstances (§ 190.2, subd. (a)), and, relying on separate opinions by Justice Mosk, any sentence longer than the human life span is inherently cruel or unusual (*People v. Deloza* (1998) 18 Cal.4th 585, 600–601 (conc. opn. of Mosk, J.) [111-year sentence]; *People v. Hicks* (1993) 6 Cal.4th 784, 797 (dis. opn. of Mosk, J.) [83-year sentence]).

Sherwood's argument misses the mark. Not only are separate opinions by a single justice not precedent (see *People v. Retanan, supra,* 154 Cal.App.4th at p. 1231), he compares apples to oranges—the authorized sentence for a single act of murder versus the aggregate sentence for 16 sex crimes against 11 children and possession of child pornography. Appellate courts have repeatedly rejected constitutional arguments and affirmed sentences that exceeded the anticipated lifetimes of defendants who were convicted of multiple sex offenses. (See, e.g., *id.* at pp. 1222, 1230–1231 [135 years to life for 17 sex offenses against four child victims]; *People v. Cartwright* (1995) 39 Cal.App.4th 1123, 1130, 1135–1137 [15 indeterminate terms of 25 years to life plus a determinate term of 53 years for violent sexual assaults on three adult victims].)

In sum, all three criteria militate against Sherwood's claim of a constitutional violation.

DISPOSITION

The judgment is affirmed.

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BURNS, J.

WE CONCUR:

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JONES, P. J.

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SIMONS, J.

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